UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
	§	CLASS ACTION
This Document Relates To:	§	
	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	

LEAD PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION TO ENJOIN DEFENDANT ANDERSEN'S BREAKUP

440

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page**

Page

STATUTES, RULES AND REGULATIONS

Lead Plaintiff the Regents of the University of California respectfully submits this *Ex Parte* Application for an Order granting: (1) a temporary restraining order preserving the *status quo* of defendants Andersen LLP, Andersen Worldwide Société Coopérative, Switzerland ("Andersen S.C."), and Andersen's member firms and affiliates (collectively, "Andersen") and enjoining Andersen's efforts to dissolve or spin-off divisions or businesses; and (2) an Order to Show Cause why a preliminary injunction should not issue. An order granting injunctive relief is necessary to ensure Andersen can satisfy a probable judgment rendered against it arising from the Enron securities fraud litigation.

I. PRELIMINARY STATEMENT

By this application, Lead Plaintiff seeks to protect a statutory right of recovery with respect to a probable judgment in favor of Lead Plaintiff and the Class. Satisfaction of a probable judgment has been put in substantial jeopardy by Andersen's actual and initiated plans to sell, spin-off, or otherwise dissolve its various businesses and divisions (the "Breakup"). Andersen's piecemeal reorganization efforts follow an indictment for obstruction of justice, investor and employee class action lawsuits, and civil and criminal investigations by the Securities and Exchange Commission, the Department of Justice, the Federal Bureau of Investigation, and Congress concerning the Enron securities fraud and Andersen's prominent role in Enron's collapse.

To escape liability and affectuate an end-run around Enron's defrauded shareholders and employees, various member firms, businesses and divisions of Andersen either have already split from Andersen and joined rivals or have initiated plans to commence the Breakup. To Lead Plaintiff's knowledge, Andersen has failed to set aside reserves or put in place provisions to ensure Andersen or the yet-to-be-acquired member firms, businesses, or divisions can satisfy the probable judgment in these consolidated lawsuits. In addition, Andersen's insurance carrier had declared insolvency because Andersen failed to make a $100 million premium payment. Thus, there is a significant likelihood that, after Andersen's businesses and divisions have been sold or spun-off and member firms have left, a judgment against Andersen will be unenforceable against the newly constituted entities, and thus a judgment will remain unsatisfied. Lead Plaintiff and the Class should

not be forced to sit back and watch their right of recovery evaporate while Andersen escapes liability.

The Supreme Court has long held that a district court's general equitable powers under the federal securities laws include the "power to make effective the right of recovery." *Deckert v. Independence Shares Corp.*, 311 U.S. 282, 288 (1940). In order "to make effective the right of recovery" of the injured Class – a right placed in substantial jeopardy by the massive uncertainties associated with Andersen's concerted Breakup effort – and to ensure payment of an award by Andersen, the instant application seeks an Order granting: (1) a temporary restraining order enjoining any Breakup and preserving the *status quo* of defendant Andersen, and (2) an Order to Show Cause why a preliminary injunction should not be issued enjoining the Breakup, thereby preserving the *status quo*. The relief Lead Plaintiff seeks is limited and an injunction will not interfere with Andersen's day-to-day operations.

II. STATEMENT OF FACTS

A. The Class Action Litigation Against Andersen

Lead Plaintiff alleges violations of the federal securities laws by Andersen and its constituent parts. Lead Plaintiff charges Andersen with violating §10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b-5, and violating §11 of the Securities Act of 1933. Lead Plaintiff alleges Andersen's audit opinions of Enron's financials, which were included in Enron's SEC filings, including the Registration Statements and Prospectuses for Enron's debt and equity offerings between 1998 and 2001, were materially false and misleading.

B. Andersen Seeks to Avoid Liability

Andersen has been mired in securities fraud scandals in recent years. Andersen paid $110 million to settle shareholder lawsuits in the Sunbeam litigation, and in connection with the Waste Management securities fraud, Andersen paid a $7 million fine to the SEC and contributed $75 million to a shareholder settlement. *See* Ex. 1. More recently, Andersen came under fire for its audit services in connection with the Baptist Foundation of Arizona, which Andersen had agreed to settle for $217 million, although it has now reneged on the deal. *See* Ex. 2.

Having admitted to an "error in judgment," "responsibility" for its share of the Enron fraud,[1] and significant, systemic document destruction, to escape liability, Andersen is pursuing a breakup strategy – a strategy at odds with Andersen's historical approach as one of the world's largest accounting firms.

Andersen's tarnished reputation and prospective civil liability have so concerned Andersen's foreign and domestic operations that divisions within and affiliates of Andersen have announced they will split from Andersen, and others have entered negotiations seeking to part with the Andersen Worldwide Organization. Most recently, on April 5, 2002, Andersen announced that the "bulk" of Andersen's U.S. tax partners and professionals will join Deloitte & Touche in an effort to "rid itself of business lines unrelated to its audit practice without passing on liability for its role in the collapse of the Enron corporation." *See* Ex. 5. In addition, Andersen signed an agreement with KMPG to acquire more than 400 partners and staff. But an "unanswered question in both the KPMG and Deloitte pacts are whether the firms could successfully wall off liability for the damages being sought by those hurt by Enron's collapse. Both pacts are likely to be dependent on assurance that Enron-related liability wouldn't be transferred." *See* Ex. 6.

On March 19, 2002, *The New York Times* reported KPMG and Andersen were negotiating to merge their foreign operations. *See* Ex. 29. These negotiations with KPMG are part of a concerted effort to limit partners' liability. "The intent of the negotiations with KPMG is to keep as much of Andersen's global network intact as possible, ***while insulating the foreign partnerships from Enron-related fallout***."[2] *Id.* Andersen's foreign partners have maintained that their firms are "separate legal entities and as such would not be liable for potential claims against Arthur Andersen L.L.P., the Chicago-based practice." *Id.*

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[1]Andersen's former CEO Joseph Berardino stated to Congress that Andersen had made an "error in judgment" over one of Enron's special purpose entities. *See* Ex. 3. But following significant document destruction, obstruction of justice charges, and internal Andersen documents showing Andersen had serious concerns about its audit services for Enron, Andersen executives acknowledge the accounting firm is responsible for more than a single error. In an email to Andersen employees, James D. Edwards, managing partner of Andersen's global markets organization, wrote "[w]e at Andersen should be held accountable for our appropriate share of responsibility related to the Enron audit." *See* Ex. 4.

[2]Unless noted otherwise, all emphasis is added and all citations and footnotes are omitted.

The European divisions of the Andersen Worldwide Organization intend to abandon Andersen. Andersen Spain has already fled, deciding to link up with Deloitte & Touche. *See* Ex. 7. Andersen Switzerland spokesman Claude Baumann stated certain Switzerland operations intended to leave Andersen Worldwide and merge with a rival company. "We are still in discussion with our competitors .... Probably in the next few days something will come up." *See* Ex. 8. And Andersen's German division has authorized a separation from Andersen Worldwide. "A spokeswoman for Andersen's German division, speaking on condition of anonymity, confirmed that partners had given the group's managers authority to break relations with Anderson Worldwide, though that step had not yet been taken. She declined to give further details." *Id.*

Andersen's Asia affiliates also are seeking to avert Enron-related liability. "Andersen's China operation on Monday added to the uncertainties over the auditor's global network, saying it was holding talks on its future with rival firms in the country. 'Andersen China is actively engaged in discussions about its future with other accounting firms in the country,' the firm said in a statement, as international units of the former blue chip accountancy firm weigh the impact of its U.S. troubles." *See* Ex. 9. Further, Singapore, the Philippines, Malaysia and Taiwan appear "set to merge with Ernst & Young, which is already combining with Andersen in Australia and New Zealand.... Hong Kong and China have done a deal with PriceWaterhouseCoopers ...." *See* Ex. 10. And the defections continue in Asia where managers of 13 Andersen affiliates "jointly endorsed a merger with KPMG LLP, a potential marriage that would make Andersen's name disappear from the region." *See* Ex. 11.

An "every man for himself" attitude pervades the divisions of Andersen. *See* Ex. 12. Few takers vie for the Andersen CEO position "at a time when some international offices are selling themselves piecemeal even as the rest of the division is in negotiations for a merger with KPMG." *See* Ex. 13. The situation at Andersen "appears increasingly dire." *See* Ex. 14. "Andersen's affiliated partnerships in other countries are severing ties with the American firm, in an attempt to retain clients and to avoid the costs from any Andersen liabilities.... 'Their international network is falling apart,'" observed Arthur W. Bowman, editor of Bowman's Accounting Report, an industry newsletter. *Id.*

C. Andersen's Insurance Carrier Is "Insolvent"

Andersen's ability to pay any judgment is further compromised by the admission of Andersen's insurer that it has been "rendered technically insolvent" due to Andersen's failure to make a required $100 million payment in connection with its settlement of a fraud claim in Arizona. *See* Ex. 2. Andersen's insurer, Professional Services Insurance Co. of Hamilton, Bermuda, is "owned by member firms of Andersen Worldwide, the Swiss cooperative that acts as the coordinating body for Andersen's rapidly dissolving global network of professional-service firms." *Id.* The Arizona Attorney General has accused Andersen of "misrepresenting its relationship with the Bermuda insurer during mediated settlement negotiations." *Id.* Attorney General Janet Napolitano said that representatives of Andersen's U.S. firm told her office, the mediator in the case and other plaintiffs' attorneys "the Bermuda insurer didn't need to be a party to the Baptist foundation settlement, because it was a captive insurance company that would pay claims as [Andersen] directed." *Id.* If the Bermuda firm's insolvency is not remedied by an injection of cash, "Bermuda regulators could seize the insurer and implement their own statutory procedures for allocating the company's remaining reserves." *Id.*

D. Andersen's Document Destruction and Indictment

Andersen has admitted a significant number of documents were destroyed. Enron's outside auditor

> notified the U.S. Securities and Exchange Commission and the U.S. Department of Justice, and is also notifying congressional committees and other agencies investigating the Enron collapse, that ***in recent months*** individuals in the firm involved with the Enron engagement ***disposed of a significant but undetermined number of electronic and paper documents and correspondence relating to the Enron engagement.***
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> * * *
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> Discarding of documents occurred during the months before the SEC issued a subpoena to Andersen. After receiving the SEC subpoena, the firm issued an instruction to preserve documents. ***At this time, we have not been able to determine whether that instruction was violated.***

See Exs. 15-16. Andersen downplayed its involvement in the document destruction, blaming the lead partner on the Enron engagement.[3] But subsequent to these press releases, the truth emerged: Andersen's document destruction was systemic, with ***corporate headquarters*** in Chicago and offices in Portland and London involved all along. Lead Enron audit partner David Duncan revealed to Congressional investigators that officials at Andersen's head office in Chicago participated in regular conference calls to discuss destroying documents. *See* Ex. 18.

On March 7, 2002, the DOJ filed an indictment in the District Court for the Southern District of Texas charging Andersen with obstruction of justice – the first time a Big Five accounting firm has been indicted for a felony. The indictment charged that Andersen earned tens of millions of dollars from Enron for internal and external auditing work and other fees for work performed in Houston, Chicago, Portland, and London. *See* Ex. 19. The indictment charges that Andersen was "put on direct notice of the allegations of Sherron Watkins, a current Enron employee and former Andersen employee regarding possible fraud and other improprieties, and in particular, Enron's use of off-balance-sheet 'special purpose entities' that enabled the company to camouflage the true financial condition of the company." *Id.* It states Watkins reported her concerns to an Andersen partner who "thereafter disseminated them within Andersen, including to the team working on the Enron audit." *Id.* The government alleges the Enron audit team violated the accounting methodology established by Andersen's own specialists working in the Professional Standards Group.

Andersen's document destruction extended beyond a few rogue Houston employees, as Andersen has portrayed.

> In addition to shredding and deleting documents in Houston, Texas, instructions were given to ANDERSEN personnel working on Enron audit matters in Portland, Oregon, Chicago, Illinois, and London, England, to make sure that Enron

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[3] "Although the firm is still working to collect all the facts, it has learned that at the direction of the lead partner an expedited effort to destroy documents in Houston was undertaken. The effort was initiated following an urgent meeting the lead partner called on Oct. 23 to organize the expedited effort to dispose of Enron-related documents. This meeting occurred shortly after the lead partner learned that Enron had received a request for information from the SEC about its financial accounting and reporting. This effort was undertaken without any consultation with others in the firm and at a time when the engagement team should have had serious questions about their actions." *See* Ex. 17.

> documents were destroyed there as well. Indeed, in London, a coordinated effort by ANDERSEN partners and others, similar to the initiative undertaken in Houston, was put into place to destroy Enron-related documents within days of notice of the SEC inquiry. Enron-related documents also were destroyed by ANDERSEN partners in Chicago.

Id. at ¶11. Based on these facts, the DOJ charged Andersen with obstruction of justice in violation of 18 U.S.C. §§1512(b)(II) and 3551, *et seq.*

E. Andersen Partners Take the Fifth

Immediately after learning on January 10, 2002 that Andersen destroyed evidence, plaintiffs sought and were granted expedited discovery concerning Andersen's document destruction. Plaintiffs deposed Andersen partners and employees, including lead audit partner David Duncan and Andersen partner Nancy Temple, an attorney. In response to questions posed about the genesis of and reasons for the document destruction, Duncan pleaded the Fifth Amendment 331 times and Temple asserted the Fifth Amendment to every question. Duncan's and Temple's repeated assertions of the Fifth Amendment entitle plaintiffs to an inference that the responsive information was adverse to Andersen.

F. Andersen Is a Unified, Worldwide Firm

Andersen is a single firm in which partners from around the world share in the Firm's revenues. In 1977 Andersen created the Andersen Worldwide Organization ("AWO"), designed to "maintain the one firm concept and deliver uniform seamless service to clients across the world." *See* Ex. 20. The umbrella organization for AWO is Andersen Worldwide Société Coopérative, Switzerland ("Andersen S.C."), a partnership organized under the Swiss Federal Code of Obligations. *See id.* Andersen S.C. was created to "coordinate on a worldwide basis" the "Professional practices of its Practice Partners who are its members and of their member firms." *Id.*

Andersen holds itself out as one firm and emphasizes its worldwide brand recognition. Former CEO Joseph Berardino declared: "With world-class skills in assurance, tax, consulting and corporate finance, Arthur Andersen has more than 77,000 people in 84 countries ***who are united by a single worldwide operating structure*** that fosters inventiveness, knowledge sharing and a focus on client success." *See* Ex. 21. "Global companies continue to demand Andersen solutions and our ability to deliver ***integrated services across borders***. Seventy percent of our revenues come from

clients who ask us to serve them in more than one country." *See* Ex. 22. Andersen also bills itself as "***the global professional services firm***" and has referred to Andersen Worldwide as "***the legal parent*** of Arthur Andersen." *See* Ex. 23. Andersen's website, www.andersen.com, confirms the firm is a single worldwide organization: "A single support staff more than 85,000 strong. Our 390 offices may be scattered amid 84 different countries, but our voice is the same. No matter where you go, or who you talk to, we act with one vision. Without boundaries." Ex. 24. As stated in Andersen's 2001 recruiting brochures:

- "We will, in Arthur Andersen's own words, ***'act as one firm and speak with one voice***. It is a united family that ***operates across hierarchies, geographical boundaries***, client groupings, service lines and competencies and feels the kinship of understanding and shared responsibility.'" Ex. 25.
- "Andersen truly is a global collaboration." Ex. 26.
- "On behalf of the ***partners and people of Arthur Andersen, in all 84 countries where we operate as a unified organization*** with a shared heritage and common values and vision, it is my [Berardino] pleasure and honor to share with you this report." Ex. 27.

Andersen's former CEO stated Andersen partners enjoy a "single" system of compensation:

> AA is already much more integrated globally than the rest of the Big Five. As Mr. Berardino points out, "there is one name over the door. We're not an alphabet soup." The cohesiveness of AA's culture has been a source of humour to outsiders, who have labeled its bean counters "Androids." ***While some rivals are still struggling with a complicated array of national partnerships, and thus different systems for sharing pay, AA partners enjoy a single, and possibly unique, system of remuneration: they receive a list of what each of them has earned in the past year.***

See Ex. 28.

III. ARGUMENT

A. Legal Standards Governing Injunctive Relief

Lead Plaintiff may seek a temporary restraining order on an *ex parte* basis. *See United States v. Hall*, 472 F.2d 261, 267 (5th Cir. 1972). "The purpose of a preliminary injunction is to preserve the *status quo* during litigation ...." *Hollon v. Mathis Indep. Sch. Dist.*, 491 F.2d 92, 93 (5th Cir. 1974). By this application, Lead Plaintiff also seeks an Order to Show Cause why a preliminary injunction should not issue. The standard for a preliminary injunction requires a plaintiff to demonstrate: (1) a substantial likelihood of success on the merits, (2) a substantial threat that the

movant will suffer irreparable injury if the injunction is not issued, (3) the threatened injury to the movant outweighs any damage the injunction might cause the opponent, and (4) the injunction will not disserve the public interest. *See Blue Bell Bio-Medical v. Cin-Bad, Inc.*, 864 F.2d 1253, 1256 (5th Cir. 1989).

The Court has the power to command Andersen to maintain the *status quo*. "Where, as here, there can be no interference with the sovereignty of another nation, the District Court in exercising its equity powers may command persons properly before it to cease or perform acts outside its territorial jurisdiction." *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289 (1952). *See SEC v. Minas de Artemisa, S.A.*, 150 F.2d 215, 217-218 (9th Cir. 1945) (noting courts have authority to enter injunctions requiring party to perform acts in foreign country).

B. Lead Plaintiff Is Entitled to Equitable Relief Sought to Preserve Its Probable Right of Recovery from Andersen

District courts may enter injunctions to preserve the *status quo* and prevent the "irreparable loss of rights before judgment," including the right to collect on a future judgment. *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 728, 730 (9th Cir. 1999). *See, e.g., A.W. Chesterton Co. v. Chesterton*, 907 F. Supp. 19, 26 (D. Mass. 1995) (court may grant injunction to enjoin changes in legal status of corporations to allow plaintiffs to "remedy their injury"); *United States v. Wallace & Tiernan Co.*, No. 705, 1953 U.S. Dist. LEXIS 2084, at *7 (D.R.I. Dec. 29, 1953) (acknowledging district courts may grant injunctions "against the commencement or completion of corporate dissolution proceedings"). If a "movant will not be able to collect the money judgment absent an injunction, the equitable remedy is appropriate." *Anascomp Inc. v. Thompson-Kent Fin.*, No. 96 Civ. 5813 (JSM), 1997 U.S. Dist. LEXIS 383, at *9 (S.D.N.Y. Jan. 21, 1997).

It is well established the "terms of the [Securities Exchange Act of 1934] are to be broadly construed to effectuate its remedial purpose."[4] *Spector v. LQ Motor Inns, Inc.*, 517 F.2d 278, 286

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[4] *See SEC v. Koscot Interplanetary, Inc.*, 497 F.2d 473, 479 (5th Cir. 1974) ("We begin our analysis by noting that the 1933 and 1934 Acts are remedial in nature, and hence are to be broadly construed."); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 592 (5th Cir. 1974) ("In interpreting the securities laws we must keep in mind the broad congressional purpose.... The securities laws are intended to protect investors, not merely to test the ingenuity of sophisticated corporate counsel."); *SEC v. R.J. Allen & Assocs. Inc.*, 386 F. Supp. 866, 880 (S.D. Fla. 1974) ("It is well established that Section 27 of the Exchange Act confers general equity powers upon the district courts.").

(5th Cir. 1975). *See Deckert*, 311 U.S. at 287-88; *SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1307 (2d Cir. 1971). The Supreme Court has expressly held district courts possess the power to grant equitable relief to preserve a plaintiff's statutory "right of recovery" under the federal securities laws:

> We think the Securities Act does ***not*** restrict purchasers seeking relief under its provisions to a money judgment. ***On the contrary, the Act as a whole indicates ... a statutory right which the litigant may enforce in designated courts by such legal or equitable actions or procedures as would normally be available to him....*** The power to enforce implies the ***power to make effective the right of recovery afforded by the Act.*** And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case.

Deckert, 311 U.S. at 287-88. *See also J.I. Case Co. Borak*, 377 U.S. 426, 433 (1964) ("It is for the federal courts 'to adjust their remedies so as to grant the necessary relief' where federally secured rights are invaded."); *Federal Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 562 (5th Cir. 1987) ("there is no doubt that [a plaintiff] has the right (and even the responsibility) to pursue equitable causes of action such as a constructive trust [or] ... the preliminary injunction"); *Newby v. Enron Corp.*, No. H-01-3624, 2002 U.S. Dist. LEXIS 486 (S.D. Tex. Jan. 8, 2002) (holding district court may consider application for a temporary restraining order in class action securities litigation). Indeed, "[o]nce the equity jurisdiction of the district court has been properly invoked by a showing of a securities law violation, the Court possesses the necessary power to fashion an appropriate remedy." *R.J. Allen*, 386 F. Supp. at 880-81. This is true despite the fact that although "the Exchange Act does not specifically authorize the ancillary relief sought in this case, 'it is for the federal courts to adjust their remedies so as to grant the necessary relief when federally secured rights are invaded.'" *Id.* (quoting *J.I. Case Co.*, 377 U.S. at 433).

C. Lead Plaintiff Satisfies the Prerequisites for Injunctive Relief

1. There Is a Substantial Likelihood of Success on the Merits

In determining the probability of success on the merits, district courts apply a flexible approach. Although a plaintiff seeking an injunction bears the burden of showing probability of success, he is

> not required to prove to a moral certainty that his is the only correct position. The prerequisite, as an absolute, is more negative than positive: one cannot obtain a

> preliminary injunction if he clearly will not prevail on the merits; however, that he is unable, in an abbreviated proceeding, to prove with certainty eventual success does not foreclose the possibility that temporary restraint may be appropriate.

Texas v. Seatrain Int'l, S.A., 518 F.2d 175, 180 (5th Cir. 1975). Thus, "[i]n a preliminary injunction context, the movant need ***not*** prove his case." *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991). Rather, "[a] reasonable probability of success, not overwhelming likelihood, is all that need be shown for preliminary injunctive relief." *Casarez v. Val Verde County*, 957 F. Supp. 847, 858 (W.D. Tex. 1997); *accord Meis v. Sanitas Serv. Corp.*, 511 F.2d 655 (5th Cir. 1975) (holding injunction under the antifraud section of the federal securities laws was proper where plaintiff made a "*prima facie* showing" of likelihood of success on the merits). Even when money damages may afford relief, "[w]here the other preliminary injunction factors are strong, a showing of some likelihood of success on the merits will justify temporary injunctive relief, even if the claim is compensable by damages." *Bank of Montreal v. Sunrise Energy Co.*, No. H-93-3459, 1994 U.S. Dist. LEXIS 21416, at *15 (S.D. Tex. Mar. 23 1994).

Here, Lead Plaintiff alleges Andersen's auditing services deceived investors about the true financial condition of Enron. Over the past four years, Enron's reported annual revenue grew fivefold, from $20 to $101 billion. But these financial results, which Andersen reported conformed with Generally Accepted Accounting Principles ("GAAP"), were manipulated and falsely inflated by hundreds of millions of dollars. In October 2001, Enron shocked the market by revealing it would incur massive losses and reduce shareholder's equity by $1.2 billion. Then, on November 8, 2001, Enron restated its financial results for 1997-2000 and the first two quarters of 2001 to reduce Enron's net income by $591 million during those years. The restatements, as defined by GAAP, constitute an admission that the financial statements, as originally issued during the Class Period and included in Enron's Registration Statements and Prospectuses, were materially false and misleading due to an "oversight or misuse of facts that existed at the time the financial statements were prepared." *See* Accounting Principles Board Opinion No. 20 ("APB 20"), ¶13, ¶38. Thus, because a restatement is itself improper unless misstatement of financials is material, Enron's restatements constitute admissions that Enron's financial results for the Class Period were materially false and misleading when made. *Id.*

The Securities Act of 1933 imposes a stringent standard for the required disclosures accompanying a public stock offering. Under §11, liability against the issuer of a security is virtually absolute, even for innocent or negligent mistakes.[5] *See Herman v. MacLean v Huddleston*, 459 U.S. 375, 382 (1983). *See generally* 15 U.S.C. §§77f, 77g, 77j. To establish liability under §11, there is no requirement that plaintiffs allege or prove fraud, reliance or scienter. *Huddleston*, 459 U.S. at 382. Section 11 imposes liability on accountants such as Andersen who certify false financial statements. *See* 15 U.S.C. §77k(a)(4). Inasmuch as Enron's financial statements for the Class Period have already been restated, Lead Plaintiff is highly likely to prevail on its §11 claims against Andersen.

Lead Plaintiff also is likely to succeed on its §10(b) and Rule 10b-5 claims. Courts have adopted a *per se* rule that misrepresenting a company's financial performance is a material misstatement. *Mowbray v. Waste Mgmt. Holdings, Inc.*, 189 F.R.D. 194, 195-96 (D. Mass. 1999), *aff'd*, 208 F.3d 288 (1st Cir. 2000); *SEC v. Murphy*, 626 F.2d 633, 653 (9th Cir. 1980); *In re Raytheon Sec. Litig.*, 157 F. Supp. 2d 131, 146-48 (D. Mass. 2001); *In re Cendant Corp. Litig.*, 60 F. Supp. 2d 354 (D.N.J. 1999); *In re Physicians Corp. Sec. Litig.*, 50 F. Supp. 2d 1304, 1317 n.17 (S.D. Fla. 1999) ("facts demonstrating [an] overstatement of revenues and income in violation of GAAP may constitute the false and misleading statements of material fact necessary for alleging a violation of Rule 10b-5"). By presenting evidence of Enron's restatements of its prior financial performance, Lead Plaintiff has established all elements of a *prima facie* case for securities fraud except scienter. *See Mowbray*, 189 F.R.D. at 195-96 ("restatement constituted an admission that [defendant] had breached its warranty to [investors] that its financial statements adequately represented the fiscal health of the company"); *see also Raytheon*, 157 F. Supp. 2d at 146-48. Here, the magnitude of the Enron fraud, Andersen's destruction of documents, and the pleading of the Fifth Amendment by Andersen partners together more than support the requisite strong inference of scienter. *Id.* at 148. Thus, there can be no doubt Lead Plaintiff will succeed on the merits.

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[5]Lead Plaintiff's Consolidated Complaint, to be filed on April 8, 2002, will allege Andersen violated §11 of the Securities Act of 1933.

2. Lead Plaintiff Will Suffer Irreparable Harm Unless the Court Grants the Equitable Relief Requested Herein

A plaintiff establishes irreparable harm for purposes of an injunction when a corporation's proposed dissolution threatens to make it "impossible for the plaintiffs to collect ... judgments." *Walczak*, 198 F.3d at 728, 730. In *Walczak*, the plaintiff filed a temporary restraining order seeking to enjoin consummation of an agreement that would have liquidated and dissolved the company and distributed its assets. *Id.* at 727-28. As a creditor of the company, the plaintiff alleged he would suffer irreparable harm if the transaction were consummated because it would be impossible for plaintiff to collect a future judgment. *Id.* at 728. The Ninth Circuit agreed. Observing that the "district court's motivation for granting the preliminary injunction was its concern that dissolution of [the company] would preclude [plaintiff] from collecting on a future judgment," the Ninth Circuit held the injunction "appropriately preserved the *status quo* and prevented the irreparable loss of rights before judgment." *Id.* at 729-30. The Ninth Circuit concluded that the injunction preserving the company's *status quo* to allow plaintiff to collect a future judgment did not violate *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). The *Walczak* court held, where a district court does not order an asset freeze, but instead enjoins a plan of liquidation or orders a company to maintain the *status quo*, the "injunction ... is distinguishable from the injunction in *Grupo Mexicano*" because the effect of the injunction is to "prevent[] the irreparable loss of rights before judgment." 198 F.3d at 730. *Accord United States ex rel. Rahman v. Oncology Assocs.*, 198 F.3d 489, 494-98 (4th Cir. 1999) ("*Grupo Mexicano's* holding is carefully circumscribed").

Judge Rosenthal has noted, "The Supreme Court has held that a preliminary injunction may be appropriate when it is shown that the defendant is likely to be insolvent at the time of judgment." *Bank of Montreal*, 1994 U.S. Dist. LEXIS 21416, at *3. In *Bank of Montreal*, Judge Rosenthal found irreparable injury and entered a preliminary injunction based on plaintiffs' claim that defendant was named in several lawsuits, had judgments entered against it and had been sued by an unsecured creditor's committee. *Id.* at *4-*5. Judge Rosenthal held the dispute was analogous to *Cattle Fin. Co. v. Boedery, Inc.*, 795 F. Supp. 362, 364 (D. Kan. 1992). In *Cattle*, the court found irreparable

harm because "serious doubt has been cast on [defendants'] ability to pay a money judgment of the magnitude that would likely be ordered if the plaintiffs were to prevail on the merits." *Id.* at 364.

Similarly, in *Productos Carnic, S.A. v. Central Am. Beef & Seafood Trading Co.*, 621 F.2d 683, 686 (5th Cir. 1980), the Fifth Circuit affirmed an injunction against an American trading company brought by a Nicaraguan beef company seeking to halt the transfer of 862,000 pounds of frozen beef that the Nicaraguan company claimed it owned. The American company argued the dispute was governed by the Uniform Commercial Code, which provided only a damage remedy. The Fifth Circuit held even if the Nicaraguan company's remedy were limited to damages, an injunction could issue to protect that remedy. 621 F.2d at 686. *Accord Deckert*, 311 U.S. at 290 (upholding preliminary injunction to preserve plaintiffs' damages remedy); *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988) (same); *Fort James Corp. v. Ratliff*, No. 3:99-CV-0148-D, 1999 U.S. Dist. LEXIS 1763 (N.D. Tex. Feb. 12, 1999) (granting preliminary injunction where defendant likely to be insolvent at time of judgment); *Commodity Futures Trading Comm'n v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 678 (S.D.N.Y. 1979) (same). Moreover, a plaintiff is ***not*** required to prove that future collectibility is a certainty; rather, the ***possibility*** that property could be irretrievably dissipated or concealed "is itself sufficient to support a finding of irreparable injury." *Republic of Panama v. Air Panama Internacional, S.A.*, 745 F. Supp. 669, 674 (S.D. Fla. 1988).

The unprecedented nature of the Enron litigation and subsequent breakup of Andersen are just the sort of extraordinary circumstances which "may give rise to the irreparable harm required for the issuance of a preliminary injunction when money damages are involved." *Citizens Sav. Bank v. Gli Tech. Servs., Inc.*, No. 96-2307, 1996 U.S. Dist. LEXIS 19128, at *9 (E.D. La. Dec. 20, 1996). "Such extraordinary circumstances exist where a corporation is insolvent and its fund in danger of depletion such that a ***failure to maintain the status quo would make any damages remedy moot.***" *Id.*

There is a significant likelihood that after the Breakup, a potential judgment against Andersen will be unenforceable against Andersen, and thus will remain unsatisfied. To Lead Plaintiff's knowledge, Andersen has failed to set aside reserves or make any other provisions which will ensure

Andersen or the break-up entities can satisfy a potential judgment. Unless the Court enjoins the Breakup, there can be no assurance that a judgment awarded to plaintiffs in this lawsuit will be satisfied. Lead Plaintiff should not be forced to stand idly by while their right to recovery disappears.

Irreparable harm is further demonstrated by the insolvency of Andersen's insurer. Not surprisingly, the Bermuda insurance company "is owned by member firms of Andersen Worldwide, the Swiss cooperative that acts as the coordinating body for Andersen's rapidly dissolving global network of professional-service firms." *See* Ex. 2.

Absent a temporary restraining order or an injunction enjoining the Breakup and preserving the *status quo*, there is a substantial likelihood Lead Plaintiff will not be afforded an effective right of recovery under the federal securities laws. Andersen's attempt to dissolve its partnership and thwart recovery by defrauded Enron shareholders warrants the Court's exercise of its equitable powers. Thus, an injunction will appropriately preserve the *status quo* and prevent "the irreparable loss of rights before judgment." *Walczak*, 198 F.3d at 730. *See also Deckert*, 311 U.S. at 290.

3. The Balance of the Hardships Tips Sharply in Lead Plaintiff's Favor

Lead Plaintiff seeks to recover on behalf of Enron's public shareholders and employees. The Court must weigh the threatened injury to the Class against any harm to Andersen. "[W]hen a district court balances the hardships of the public interest against a private interest, the ***public interest should receive greater weight***." *See FTC v World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989).

The balance of hardships presented by the instant application tips sharply in favor of plaintiffs and the Class. As explained above, Andersen will succeed in thwarting plaintiffs' statutory right of recovery under the federal securities laws if the Breakup is not enjoined, especially if its partners, divisions or member firms are acquired by rival firms via liability-limiting agreements. This is precisely the kind of situation Judge Rosenthal has held tips the balance of hardship in plaintiffs' favor: "With the injunction, the rights of ***all*** parties are ensured; in its absence, the rights of plaintiffs are put in jeopardy. Thus, the balance of harm tips in favor of the plaintiffs." *Bank of*

Montreal, 1994 U.S. Dist. LEXIS 21416, at *13-*14 (citing *Cattle*, 795 F. Supp. at 365). Similarly, in *International Controls Corp. v. Vesco*, 490 F.2d 1334, 1347 (2d Cir. 1974), the Second Circuit found the balance of hardships tipped "decidedly in favor" of plaintiff where a court enjoined the sale of a commercial aircraft, the sole substantial asset owned by a defendant corporation. Sale of the aircraft "might well result in the dissipation of an imporant asset, leaving little for [plaintiff] to recapture should it eventually succeed in this lawsuit," and thus the balace tipped decidedly in plaintiff's favor. *Id.* Notably, the *International Controls* court held the injunction was narrowly tailored because enjoining the sale of the aircraft would not "interfere" with its operation. *Id.* at 1347-48. Here, the injunctive relief Lead Plaintiff seeks is narrowly tailored because it will not interfere with Andersen's auditing, accounting, tax and other businesses or Andersen's day-to-day operations, but merely will ensure Lead Plaintiff and the Class can enforce their statutory right to collect on a money judgement rendered against Andersen.

Moreover, granting the requested relief, which will allow Andersen to continue its businesses and operations, will impose little, if any, hardship on Andersen. Indeed, injunction is appropriate where the "threat of ineffective remedy [] outweighs the damage which the injunction might cause." *Productos Carnic*, 621 F.2d at 687, *International Controls*, 490 F.2d at 1347-48, *Bank of Montreal*, 1994 U.S. Dist. LEXIS 21416, at *13-*14. Accordingly, if the requested relief is granted, any hardship on Andersen is *de minimus*, if any exists at all.[6]

D. A Bond Is Unnecessary

The posting of a bond is not a prerequisite to the issuance of a temporary restraining order or a preliminary injunction in this case because Andersen cannot demonstrate that preserving the *status quo* will cause them recognizable economic harm. *See FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 714 n.1 (5th Cir. 1982) ("a temporary restraining order or a preliminary injunction may be granted without bond"); *see also International Controls*, 490 F.2d at 1356. Indeed, "some courts have waived the security requirement when they have found that the plaintiff was financially

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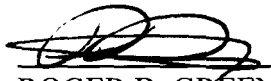
[6]In addition, the imposition by the Court of a temporary restraining order will provide the Court with a meaningful opportunity to consider and evaluate the effects of the Breakup on Lead Plaintiff's and the Class' right of recovery.

responsible or was very likely to succeed on the merits." *Continuum Co. v. Incepts, Inc.*, 873 F.2d 801, 803 (5th Cir. 1989); *Scherr v. Volpe*, 466 F.2d 1027, 1035 (7th Cir. 1972) ("Since the amount of the security rests within the discretion of the district judge ... as well as the strong likelihood of success on the merits which the plaintiffs have demonstrated, we find that the district court did not abuse its discretion in failing to require the plaintiffs to post a security."). Because Lead Plaintiff has a substantial likelihood of success and the balance of harms weighs heavily in Lead Plaintiff's favor, no bond is required.

DATED: April 5, 2002

Respectfully submitted,



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DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 401 B Street, Suite 1700, San Diego, California 92101.

2. That on April 5, 2002, declarant served the LEAD PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTION TO ENJOIN DEFENDANT ANDERSEN'S BREAKUP by depositing a true copy thereof in a United States mailbox at San Diego, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5th day of April, 2002, at San Diego, California.

Debbie Granger

DEBBIE GRANGER

SERVICE LIST
April 5, 2002

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** = Denotes service via facsimile.

The Exhibits May

Be Viewed In The

Office of the Clerk